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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 63

A. P. DICKSON, et al, *Petitioners*,
Vs.
UHLMANN GRAIN COMPANY, a corporation, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

PETITION FOR REHEARING

I. P. RYLAND,
ARTHUR MAG,
ROY B. THOMSON,
ALFRED M. SEDDON,
PAUL R. STINSON,

Counsel for Respondent, Uhlmann Grain Company.

RYLAND, STINSON, MAG & THOMSON,
Of Counsel.

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PETITION FOR REHEARING

Respondent respectfully enters its protest against the fact findings and opinion of the learned majority. It urges reconsideration and rehearing upon the ground that the approved findings of the trial court are conclusively shown to be unfounded, both by uncontested record facts, and by those held in the opinion to be without dispute.

I.

THERE WAS NO EVIDENCE THAT DEFENDANTS' UNDERSTANDING DIFFERED FROM THE AGREEMENTS AS ACTUALLY EXECUTED.

The majority opinion finds that the transactions on the exchanges were real and valid, but that there was evidence that Dickson's contracts with McDonough at Carrollton did not contemplate the actual execution of such agreements in Dickson's behalf (op. 4). His own testimony is that they did (R. '51-152):

> "Q. Did you understand that the Uhlmann Grain Company was to execute your orders for you? A. Yes, sir.
>
> Q. And act as your agent? A. Yes, sir.
>
> Q. In making these purchases? A. Yes, sir.
>
> Q. Either in Winnipeg or in Chicago, or both? A. Yes, sir.
>
> Q. And that these transactions were to be consummated on those markets; you understood that, Mr. Dickson? A. Yes, sir.
>
> Q. Then you understood that the contract to sell was the contract whereby the Uhlmann Grain Company, acting for you, agreed that during a certain month in the future that you would sell so many bushels of wheat? A. Yes, sir.
>
> Q. On this market? A. Yes, sir."

The opinion's partial recognition of this testimony (5)—

> "The defendants undoubtedly knew that the company regularly entered into contracts on the ex-

> changes corresponding to the transactions at Carrollton."—

disposes of it no more than if not mentioned at all. If the statement in Mr. Justice Butler's dissenting opinion (3)—

> "Defendants admit that they intended the orders to be executed on the exchanges, that they were so executed, and that the accounts are correct."—

reflects the record, and it does, then convincing reason appears for a re-argument of this cause. It shows that the sole question propounded by the majority opinion (4), "Whether the customer, in his agreement with the company, ordered that contracts be entered into in his behalf on the exchange," was resolved in the negative on the mistaken assumption that the *facts* raised an issue which was never in the case.

The evidence, and there was none contrary, was controlling. It was conclusive upon Dickson and his co-defendants (he testified for all) that they engaged plaintiff as broker to do precisely what it did do in every transaction—go upon exchanges and execute actual contracts for them. It completely disposes of every circumstance alluded to in the opinion as indicative of mere bucket shop transactions between McDonough and the defendants. It definitely establishes as incorrect the conclusion that the dealings between defendants and plaintiff began and ended at Carrollton, even in the minds of defendants.

Nor was this testimony of Dickson mere inconsistency with his direct examination. While he did testify to an understanding with McDonough that there was to be no delivery, that evidence was qualified by the statement that he was to "get out" of making or taking delivery of the grain by offsetting purchases and sales before delivery was

required under the contracts (R. 152, 156, 157); and that all initiating and offsetting purchases and sales (except the last transaction (R. 150) in November (R. 163) were executed at his direction or with his sanction (R. 154). Thus the conclusion that the transactions between defendants and McDonough were mere wagering contracts, bucket shop dealings, overlooks uncontested record facts and goes beyond the limits of defendants' testimonial claims.

II.

THE CIRCUMSTANCES, HELD SUFFICIENT TO WARRANT THE CONCLUSION THAT PLAINTIFF WAS CONDUCTING A BUCKET SHOP AND PERMITTING DEFENDANTS TO ENTER INTO MERE WAGERING CONTRACTS, WERE WHOLLY WITHOUT PROBATIVE FORCE IN VIEW OF THE RECORD.

Notwithstanding the undisputed fact, including the testimony of defendants themselves, that actual orders were intended to be and were given, followed by the execution of valid contracts outside of Missouri, the majority opinion rests its contrary finding upon certain circumstances held established: that no grain was actually delivered, that defendants put up margins, that their obligations exceeded their financial capacity, that the Carrollton office of plaintiff had furnishings in it characteristic of a bucket shop, that McDonough solicited orders, that defendants were not in the grain business, that more grain was contracted for than defendants could possibly take or deliver, and finally, that Carrollton was a small city.

If defendants had asserted an agreement or under-

standing not to execute bona fide contracts, that testimony, together with the facts arrayed, might have raised an issue. But the ultimate and controlling fact which the Court held they tended to prove was conceded out of the case by defendants' own disclaimer. The opinion recognized that these circumstances did not tend to prove that the orders as executed were fictitious in view of undeniable evidence that they were real. But the evidence that the orders themselves were real was equally conclusive with that concerning their execution. And in overlooking this fact the learned majority erred.

Even in the absence of defendants' own direct and positive evidence to the contrary, the circumstances relied on that no grain was delivered, that defendants put up margins, were not in the grain business or likely or able to make or take delivery were, standing alone, wholly insufficient to establish an unlawful intent. See authorities, Respondent's Brief, 15-16, including *Clews* v. *Jamieson*, 182 U. S. 461. That no grain was received or delivered is accounted for by the fact that in every instance the initial orders were cancelled out by offsetting transactions regarded by the law as valid. *Board of Trade* v. *Christie*, 198 U. S. 236. That orders were solicited, or that the Carrollton office had a typewriter, telegraph key and blackboard surely, on reconsideration, will not be regarded as evidence of wagering or bucket shop transactions. The telegraph instrument transmitted defendants' actual orders and the blackboard recorded prevailing market quotations which were used for information and not as the basis for determining defendants' losses or gains.

III.

THE CONCLUSION THAT PLAINTIFF ENTERED INTO ACTUAL CONTRACTS ON THE EXCHANGES AS A DEVICE TO ENABLE DEFENDANTS TO GAMBLE OVERLOOKS AND IS CONTRARY TO THE RECORD FACTS AND THE APPLICABLE LAW.

If we are correct in the assertion that the majority opinion has overlooked defendants' own testimony, or has misconceived its legal effect, then the additional conclusion that the execution of actual contracts on the exchanges was a mere device to clothe marginal dealings with reality, is vulnerable for the same reasons. That conclusion relies and rests upon the same circumstances.

It is at fault for another reason. The opinion concedes and finds that orders were taken at Carrollton, relayed to Kansas City and corresponding contracts executed at the markets (3) with defendants' knowledge (5), that the purchases and sales were valid (3). An unlawful intent may not be spelled out of the performance of a lawful act or the exercise of a lawful right. In *Clews* v. *Jamieson, supra,* this Court said (182 U. S., l. c. 493):

> "The fact that at the time of the sale the complainants did not own any of the stock cannot support the presumption (of a gambling transaction), because it is perfectly valid to make such a sale, and an illegal intent accompanying the performance of a perfectly legal act cannot be presumed."

See also, *United States* v. *Isham,* 17 Wall. 496; *Bullen* v. *Wisconsin,* 240 U. S. 625, 630; *Iowa Bridge Co.* v. *Commissioner* (C.C.A.) 39 Fed. (2d) 777, 781; *Mecom* v. *Fitzsimmons Drilling Company,* 284 U. S. 183, 188-190, 76 L. Ed. 233, 238, 239.

The finding that plaintiff entered into actual contracts on the exchanges merely "to enable it to secure the data for the defendants' gains and losses" is justifiable only on the assumption that defendants never were and never intended to be parties to such agreements. It is true that as written, those contracts were between plaintiff and another broker-member of the exchange. But this was because required by the rules (R. 75, 79, 81) and Sec. 4(b) of the Grain Futures act. But they were executed for defendants as principals between whom and the other broker or his principal, privity of contract existed. *Clews* v. *Jamieson*, 182 U. S. 461. That defendants could have enforced and were bound to performance does not lie in doubt. *Clews* v. *Jamieson*, 182 U. S. 461, 482, 483. That they did enforce them and that they were not mere "make-believe" is unequivocally established, both by their testimony concerning, and their actions in, every transaction. Dickson testified that he gave the orders. They were confirmed in writing without objection on the day following each execution (R. 157). The losses and gains were fixed, not measured, by the contracts. They were not mere data for purported orders. Plaintiff's claim arose out of the fact that the transactions were real. It paid the clearing houses what defendants lost; defendants what they gained. The correctness of the accounts sued on was conceded.

There was no evidence or claim that plaintiff was not to execute these contracts on the exchanges, that defendants were not to be bound by them, that their terms were not to be carried out, or that defendants were merely to deal in differences or margins. The evidence of defendants themselves and their acts in every transaction were affirmatively to the contrary. The conclusion is unfounded that the orders as given were pretended or illegal or that the contracts as executed were devices.

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In last analysis, the majority opinion rests, must rest, upon the proposition that an intent to avoid delivery by offsetting transactions is illegal. Plaintiff's office at Carrollton was not a bucket shop. It was an outside branch of a brokerage office where orders typical of those taken in all brokerage offices were initiated. If the orders as given were illegal, then most of those taken in brokerage offices and the contracts executed on the great stock and grain exchanges of the country are void under the ruling of the majority as applied to the record here.

IV.

McDONOUGH'S AUTHORITY

Every transaction was evidenced by a written confirmation between plaintiff and defendants reciting the execution by plaintiff for defendant and for his account, of a contract on an exchange. Each was lawful on its face (*Clews* v. *Jamieson, supra*). Defendants admitted receipt of these written confirmations at the close of each transaction and knowledge of their contents (R. 44-46, 153). McDonough had no authority, apparent or real, to vary their terms (R. 100-101, 102, 130). All orders initiating in Carrollton were wired to Kansas City for acceptance or rejection (R. 131). McDonough merely solicited orders. He made no contracts.

There is in the record no evidence that McDonough had or was clothed with authority to vary the terms of the written agreements. See, 2 Corpus Juris, pp. 645, 646. If McDonough had told defendants that their orders were mere pretenses and were not to be executed on the exchanges, defendants would have had no right to rely upon such statements. 2 Corpus Juris, pp. 563, 564. *A fortiori*

is this true in view of the daily written confirmations from Kansas City apprising them of the execution of actual transactions for their account. In *Anthony* v. *Jasper County*, 101 U. S. 693, 699, this Court said:

> "Every person who deals with or through an agent assumes all the risks of a lack of authority of him who attempts to bind another."

Certainly McDonough's authority to solicit and transmit orders to Kansas City did not include the power orally to change them into illegal wagers. It is equally true that the law will not permit third persons to assume an agent's authority to do an illegal act. In *Call* v. *Palmer*, 116 U. S. 98, 102, it is said:

> "An authority (to an agent) to violate the law will never be presumed."

V.

THE GRAIN FUTURES ACT

If the orders were mere pretenses the opinion holds and we concede that they were invalid at the common law. The Grain Futures act does not touch fictitious orders given or taken in bucket shops. On the other hand the opinion concedes that if the orders comported with the transactions as executed on the exchanges that they were valid and not subject to the Missouri law or statutes, being executed outside of that state. In neither situation is there a place for construction of the Federal act or its effect on existing state statutes.

The opinion says *obiter* that the Act neither recognized nor pronounced as valid transactions in futures on Federal contract markets. That question is not before the

court. It doubtless will arise at some time in a case, for example, where orders are taken in Missouri and executed on the Kansas City Board of Trade, a Federal contract market. In such a case it will have to be determined whether the rights of the parties and the validity of their contracts are governed by Section 4324 et seq., of the Missouri Statutes, or by the Federal act regulating futures transactions on Federal contract markets. Without urging again our contention that the Federal act superseded all existing state laws covering actual transactions in grain futures (see Resp.'s Brf. p. 18, Suppl. Arg. p. 16), we do feel justified in requesting that the opinion as finally written, should leave those important questions entirely open. As it stands, the dictum leaves the inference that most of the futures transactions executed on the Kansas City Board of Trade and on other Federal contract markets located in states having similar statutes are invalid notwithstanding the Federal act.

CONCLUSION

If the opinion of the majority becomes the final decision of the Court it will fall heavily upon a very substantial portion of the business of grain and stock brokers as commonly conducted on the grain and stock exchanges of the country. Heretofore actual contracts executed by brokers for their principals on the exchanges calling for the future delivery of stocks or grain have, by the settled law, been held to be valid transactions notwithstanding an intent on the part of the principals to close them out by offsetting transactions without delivery in accordance with the rules and practices of the exchanges. We feel that the majority opinion announces a departure from those principles. For by it a customer's admitted and lawful intent to offset may be converted into a mere wagering or gambling intent upon the mere showing of facts and circumstances. By the decision the way will have been made easy by parol testimony, to brand as devices and repudiate as mere sham, solemn written contracts between brokers and customers, between the brokers themselves representing their principals, and the written rules of the exchanges which are a part of them. Our whole system of marketing grain and securities previously regarded as lawful will hereafter stand in the twilight zone between lawful speculation and gambling pretenses.

The opinion also cites with approval, *Harvey* v. *Merrill*, 150 Mass. 1. That case holds that an intent to set-off contracts of purchase and sale for future delivery by counter-transactions is unlawful. It is in conflict with the Christie Grain Case, *Clews* v. *Jamieson*, and a long line of Federal cases which hold that set-off is the legal equivalent of delivery. See Resp. Brf., pp. 15-16. We do not believe that the intent of the majority was to overturn the doctrine

of the common law long recognized and established by these Federal decisions; for the opinion recognizes the contracts on the exchanges as valid. Nevertheless, if the ruling in the Massachusetts case is approved, these transactions, recognized by this court and by economists as performing a useful function in commerce and business, are from now on proscribed, with devastating effect on the grain and stock brokerage business.

The sum of our contention is that if it is lawful to fulfill contracts of purchase and sale for future delivery by counter or offsetting transactions before delivery date, *that it is lawful so to intend in the beginning;* that the opinion of the majority is to the contrary, and that for this reason a rehearing should be granted.

Respectfully submitted,

I. P. RYLAND,
ARTHUR MAG,
ROY B. THOMSON,
ALFRED M. SEDDON,
PAUL R. STINSON,

Counsel for Respondent,
Uhlmann Grain Company.

RYLAND, STINSON, MAG & THOMSON,
Of Counsel.

State of Missouri, County of Jackson, ss:

Paul R. Stinson, of lawful age, being duly sworn, on his oath says that he is one of the counsel of record of the above named respondent; that the foregoing Petition for Rehearing is presented in good faith and not for delay.

IN WITNESS WHEREOF I have hereunto set my hand this 21st day of February, 1933.

PAUL R. STINSON,

Subscribed and sworn to before me this 21st day of February, 1933.

HAZEL M. DAVIS,
Notary Public.

My commission expires Jan. 3, 1935.